IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	SC94927
	)	
DERRICK CARRAWELL,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
DIVISION THIRTEEN,
THE HONORABLE STEVEN R. OHMER,
JUDGE AT TRIAL AND SENTENCING

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the sentence and judgment imposed and executed in case no. 1222-CR02622-01 by the Honorable Steven R. Ohmer, division thirteen of the Circuit Court of the City of St. Louis. In that case, Judge Ohmer found Appellant to be a prior and persistent drug offender and found Appellant guilty, pursuant to a jury trial, of committing one count of the class C felony of possession of a controlled substance in violation of § 195.202 RSMo. Subsequently, Judge Ohmer sentenced Appellant to serve twelve years in the Missouri Department of Corrections for the offense.

In ED100471, Appellant appealed the sentence and judgment Judge Ohmer handed down in 1222-CR02622-01 to the Missouri Court of Appeals for the Eastern District pursuant to the provisions of Article V, Section 3 of the Missouri Constitution and § 477.050 RSMo. Mo. Const., Art. V, § 3; § 477.050 RSMo. The Missouri Court of Appeals denied that appeal. Appellant then filed a motion for rehearing, which was also denied. Appellant then applied for and was granted transfer to this Court. As such, this Court has jurisdiction to hear this matter pursuant to the provisions of Article V, Section 10 of the Missouri Constitution and Rule 83.04. Mo. Const., Art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

The state filed an amended information in which it alleged that Appellant committed the class C felony of possession of a controlled substance in violation of § 195.202 RSMo[1] in that, on or about April 9, 2012, Appellant possessed heroin knowing of its presence and nature. (L.F. 10-11)[2]. The state also alleged that Appellant was a prior and persistent drug offender in that amended information. (L.F. 10-11).

Appellant filed a written "Motion to Suppress Evidence" in advance of trial. (L.F. 12-14). The case went to trial the week of July 1, 2013. (L.F. 15-18). The trial court heard and denied Appellant's motion to suppress evidence prior to trial. (L.F. 15-18, Tr. 157-184). The case then proceeded to trial.

At trial, prior to closing arguments, the trial court found Appellant to be a prior and persistent drug offender. (Tr. 244-246). Subsequently, the jury found Appellant guilty of the lone count of possession of a controlled substance. (Tr. 268-271). The trial court then sentenced Appellant to serve twelve years in prison. (L.F. 23-25).

Evidence Pertaining to Appellant's "Motion to Suppress Evidence"

On April 9, 2012, St. Louis City police officer Curtis Burgdorf and three other police officers, Mike Keegel, Adam Duke, and Kenneth Allen, were in the 2000 block of Madison talking to neighborhood residents about increased gang and narcotic activity in

[1] All statutory references are to Missouri Revised Statutes 2000 unless otherwise noted.

[2] The record on appeal consists of a two volume trial transcript, (Tr.), and a legal file, (L.F.).

the area when Officer Burgdorf observed a vehicle that pulled up and parked next to the curb. (Tr. 158-159, 190-194). This vehicle caught Officer Burgdorf's attention. (Tr. 160, 194). When asked why the vehicle caught his attention, Officer Burgdorf testified as follows:

> "First off, when the vehicle pulled up the driver did not immediately park next to the curb. He actually stayed in the traffic lane and began staring over at our direction. This lasted about 30 seconds." (Tr. 194).

Mindful that the driver seemed to be looking at him and the other officers, Officer Burgdorf kept his eye on the driver as the driver exited his vehicle. (Tr. 194). After exiting his vehicle, the driver stared in Officer Burgdorf's direction, grabbed his crotch, spit in Officer Burgdorf's general direction, and said: "What the fuck are you looking at bitch?" (Tr. 160-161, 194-195).

At that point, aside from the other police officers that were on the scene, there were several other people in Officer Burgdorf's vicinity. (Tr. 160-162, 195-196). Among these other people were three subjects with whom Officer Burgdorf and the other officers had been speaking. (Tr. 160-162, 195). One of these subjects had his seven year old juvenile daughter with him. (Tr. 161-162, 195). There were also two or three other females in the area. (Tr. 161-162, 195). These females were located to the west of Officer Burgdorf's location on the same side of the street as him. (Tr. 195). In addition, there were four or five other people in the vicinity. (Tr. 161-162, 195). These other people were located on the south side of the street, which is the side of the street on which the driver had parked his vehicle. (Tr. 195-196).

After the driver stepped out of his vehicle and yelled profanity at Officer Burgdorf, the driver walked to the passenger side of his vehicle and retrieved a white plastic bag. (Tr. 162, 196). The driver then continued to mutter profanities towards Officer Burgdorf and the other officers. (Tr. 162, 196-197). The driver would stare at Officer Burgdorf and say things like: "mother fucking police." (Tr. 197). Officer Burgdorf indicated that everyone in the area was taken aback that Appellant was speaking to the police like he was. (Tr. 198).

Officer Burgdorf testified that he was used to being yelled out at, but decided to approach the driver of the vehicle and arrest him for peace disturbance when the father of the juvenile subject who was in the area placed one hand over her ear and then pulled her in and covered her other ear with his leg. (Tr. 163, 197-198). At that point, it was clear to Officer Burgdorf that the father of the juvenile was uncomfortable with his daughter hearing the language Appellant was using. (Tr. 198).

As Officer Burgdorf approached the driver, the driver started backing up, said "[w]hat the fuck are you going to do," and continued walking towards a gated area. (Tr. 198). After hearing Appellant say "[w]hat the fuck are you going to do," Officer Burgdorf advised the driver that he was under arrest for peace disturbance and advised him to stop. (Tr. 199). At that point, a female who the driver later identified as his daughter opened a gate for him. (Tr. 201). The driver then went through the gate into a gated area that surrounded an apartment complex and ordered the female to close the gate, but she did not do so. (Tr. 201). At that point, Officer Burgdorf stepped through the gate and again advised the driver to stop and that he was under arrest, but the driver

would not cooperate. (Tr. 201). A few steps later, as the driver opened a door that led into one of the apartment buildings contained within the apartment complex, Officer Burgdorf grabbed the driver by the arm and pulled him away from the door. (Tr. 201-202). At that point, the driver pulled away from Officer Burgdorf in an attempt to break Officer Burgdorf's grasp, but Officer Burgdorf pushed the driver up against a portion of the fencing in the fenced in area. (Tr. 201-204). Other officers were then able to reach through the fenced in area and attempted to assist Officer Burgdorf in securing the driver and in handcuffing him. (Tr. 201-205). All the while, Officer Burgdorf advised the driver to drop the bag several times, but the driver refused. (Tr. 205). Eventually, Officer Burgdorf was able to physically rip the bag from Appellant's hands and he and the other officers were then able to secure the driver and complete the handcuffing process. (Tr. 205-206).

The driver's demeanor did not change even after he was arrested. (Tr. 206-207). After arresting the driver, Officer Burgdorf grabbed the bag off the ground and conveyed the driver to a police vehicle. (Tr. 206). All the while, the driver continued to scream vulgarities. (Tr. 206-207). At one point, the driver called Officer Burgdorf a "nigger-headed devil." (Tr. 206-207). Then once Officer Burgdorf and the other officers got the driver to the police vehicle and opened the door in an attempt to place the driver in the police vehicle, the driver lunged his body forward closing the door with his body. (Tr. 207). At that point, the driver began screaming again and yelled out: "Look at this mother fucker. He's beating me and calling me nigger." (Tr. 207). Ultimately, however, the officers were successful in getting the driver into the police vehicle. (Tr. 208).

Once the driver was placed inside the police vehicle and secured, Officer Burgdorf turned his attention to the bag. (Tr. 208). He testified that he did not know what was in the bag prior to opening it and opened the bag because he was concerned that there may have been a weapon in there and because it is department policy to inventory an arrested subject's property. (Tr. 208). After opening the bag, Officer Burgdorf found numerous pieces of what was a ceramic plate and a tan powdered substance which he believed to be heroin. (Tr. 208-210).

NOTE: Additional facts may be set forth in the argument portion of Appellant's brief in order to avoid unnecessary repetition

POINT RELIED ON

I.

The trial court erred and abused its discretion in denying Appellant's "Motion to Suppress Evidence," and in admitting evidence at Appellant's trial that police officers arrested Appellant for violating a St. Louis City ordinance pertaining to peace disturbance, seized a bag he was carrying at the time of his arrest, searched it, and found heroin inside because the officers' actions violated Appellant's constitutionally protected rights to be free of unreasonable searches and seizures, as guaranteed by article one, section fifteen of the Missouri Constitution and the Fourth and Fourteenth amendments to the United States Constitution, in that: a) it is clear that Appellant did not voluntarily abandon the bag and that the officers physically ripped it from him, b) the state failed to show what the St. Louis City ordinance pertaining to peace disturbance says and otherwise failed to show that the officers had probable cause to arrest Appellant for violating its provisions so as to justify their subsequent seizure and search of the bag he was carrying at the time of his arrest, and c) even if the officers lawfully arrested Appellant, the state failed to show that they searched the bag pursuant to lawful authority.

State v. Carpenter, 658 S.W.2d 406 (Mo. Banc. 1987);

State v. Furne, 642 S.W.2d 614, 616-617 (Mo. Banc. 1982);

§ 542.296 RSMo;

Missouri Constitution, Article I, § 15; and

U.S. Constitution, Amendments IV and XIV.

ARGUMENT

I.

The trial court erred and abused its discretion in denying Appellant's "Motion to Suppress Evidence," and in admitting evidence at Appellant's trial that police officers arrested Appellant for violating a St. Louis City ordinance pertaining to peace disturbance, seized a bag he was carrying at the time of his arrest, searched it, and found heroin inside because the officers' actions violated Appellant's constitutionally protected rights to be free of unreasonable searches and seizures, as guaranteed by article one, section fifteen of the Missouri Constitution and the Fourth and Fourteenth amendments to the United States Constitution, in that: a) it is clear that Appellant did not voluntarily abandon the bag and that the officers physically ripped it from him, b) the state failed to show what the St. Louis City ordinance pertaining to peace disturbance says and otherwise failed to show that the officers had probable cause to arrest Appellant for violating its provisions so as to justify their subsequent seizure and search of the bag he was carrying at the time of his arrest, and c) even if the officers did not unlawfully arrest Appellant, they unlawfully searched his bag without warrant and without lawful authority.

Preservation of Error

Before trial, Appellant filed a "Motion to Suppress Evidence." (L.F. 12-14). The motion alleged that police officers arrested Appellant for "peace disturbance," seized a bag that was in Appellant's possession at the time of his arrest, searched the bag, and found heroin inside of it. (L.F. 12-14). Appellant's motion also alleged that the search of

the bag "was unlawful in that it was conducted without a warrant, without probable cause, and was not within the scope of any exception to the warrant requirement," (L.F. 12-13), and that "the search and seizure were not incident to a lawful arrest." (L.F. 13).

The trial court then held a hearing on Appellant's "Motion to Suppress Evidence," and denied the motion. (L.F. 16, Tr.157-184). At the conclusion of that hearing, Appellant's attorney requested a continuing objection in regard to the motion and the trial court responded by saying: "Yeah. The motion to suppress objection will be continuing and for the record it's preserved for any appeal." (Tr. 183-184). Then during Appellant's actual trial, the trial court took it upon itself to note the continuing objection when the state offered state's exhibits 3[3] and 3A[4] into evidence, (Tr. 209-210), and also when the state offered state's exhibits 4[5] and 4A[6] into evidence. (Tr. 211-213). In admitting state's exhibits 3 and 3A, the trial court said:

> "It's admitted other than the objection noted and will be continuing and overruled. The exhibit is admitted." (Tr. 209-210).

In admitting state's exhibits 4 and 4a, the trial court said:

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[3] State's exhibit 3 was an evidence envelope. (Tr. 209).

[4] State's exhibit 3A was a plastic bag and a ceramic plate. (Tr. 209).

[5] State's exhibit 4 was an evidence envelope. (Tr. 211-212).

[6] State's exhibit 4A was Ziploc evidence bag containing a cellophane baggie containing heroin. (Tr. 211-213, 238-248)

"I just want to be clear. Again, subject to the objection the exhibits then will be admitted." (Tr. 213).

Subsequently, after the trial, Appellant filed a motion for new trial in which he claimed that "the trial court erred in denying [Appellant's] Motion to Suppress Evidence," (L.F. 26), and that the trial court erred "in admitting state's exhibits 3, 3a, 4, and 4a over [Appellant's] timely and continuing objection that they were the result of an unlawful search and seizure." (L.F. 27). The trial court then considered Appellant's motion for new trial and denied it without suggesting that the issue had been waived/not properly preserved, and without so much as a peep from the state suggesting that the issue had been waived/not properly preserved. (Tr. 274-275).

As such, Appellant requests this Court to find that the facts of this case are similar to those that were present in State v. Mondaine, State v. Baker, and State v. Martin, to follow the holding of those cases, to find that in Appellant's case there was an understanding between the parties and the trial court that Appellant did not wish to waive his pretrial position on the motion to suppress evidence, and to treat this issue as if it has been fully preserved. see State v. Mondaine, 178 S.W.3d 584, 588 (Mo. App. E.D. 2005) (holding that where a trial court admits evidence at trial and in the course of doing so, sua sponte acknowledges and denies a pretrial motion to suppress that evidence, the issue of whether the trial court erred in denying the pretrial motion is considered preserved); see also State v. Baker, 103 S.W.3d 711, 716-717 (Mo. Banc. 2003), and State v. Martin, 79 S.W.3d 912, 915 (Mo. App. E.D. 2002) (holding that the failure of a defendant to object to the admission of evidence at trial or the fact that a defendant says "no objection" to the

admission of that evidence at trial does not constitute a waiver of a pretrial motion to suppress that evidence where the parties have an understanding that the defendant had no intention of waiving that pretrial motion to suppress evidence). Alternatively, if this Court deems that the issue is not properly preserved for appellate review, Appellant requests plain error review pursuant to Rule 30.20. "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20.

Standard of Review

At a hearing on a motion to suppress, "the state bears both the burden of producing evidence and the risk of nonpersuasion to show by a preponderance of the evidence that the motion to suppress should be overruled."§ 542.296(6) RSMo; State v. Grayson, 336 S.W.3d 138, 142 (Mo. Banc. 2011) (citing State v. Franklin, 841 S.W.2d 639, 644 (Mo. Banc. 1992)). An appellate court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling. State v. Grayson, 336 S.W.3d at 142 (citing State v. Pike, 162 S.W.3d 464, 472 (Mo. Banc. 2005)). The appellate court defers to the trial court's determination of credibility and factual findings, inquiring only "whether the decision is supported by substantial evidence, and it will be reversed only if clearly erroneous." State v. Grayson, 336 S.W.3d at 142 (citing State v. Goff, 129 S.W.3d 857, 862 (Mo. Banc. 2004) and quoting State v. Edwards, 116 S.W.3d 511, 530 (Mo. Banc. 2003)). By contrast, legal "determinations of reasonable suspicion and probable cause"

are reviewed de novo. State v. Grayson, 336 S.W.3d at 142 (citing Ornelas v. United States, 517 U.S. 690, 699 (1996)). Where the trial court fails to make findings, "[t]he facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded." State v. Norfolk, 366 S.W.3d 528, 531 (Mo. Banc. 2012) (citing State v. Galazin, 58 S.W.3d 500, 507 (Mo. Banc. 2001)).

Argument

The Fourth Amendment to the U.S. Constitution, enforceable against the states through the due process clause of the Fourteenth Amendment, guarantees the right of the people to be secure from unreasonable searches and seizures. State v. Williams, 382 S.W.3d 232, 234-235 (Mo. App. W.D. 2012). This same right is guaranteed by article I, section 15 of the Missouri Constitution. Id. Pursuant to these constitutional guarantees, warrantless searches and seizures are deemed per se unreasonable subject only to a few specifically established and well-delineated exceptions. Id. None of those exceptions apply in Appellant's case.

I. It is clear that Appellant did not voluntarily abandon the bag and that the officers physically ripped it from him.

During the hearing on Appellant's "Motion to Suppress Evidence," the trial court found that Appellant abandoned the bag containing the heroin. (L.F. 181-183). However, this finding is clearly erroneous. At the hearing, Officer Burgdorf testified that he asked Appellant to drop the bag, that Appellant would not do so, and that he then forcefully removed it from Appellant's hands. (Tr. 166). Officer Burgdorf flat out said: "I

forcefully removed it from his hands," (Tr. 166), and "I eventually ended up ripping it from his hands and was able to force his other hand behind his back to complete the handcuffing process." (Tr. 205-206). As such, it is clear that Appellant did not voluntarily give up control of the bag, that Officer Burgdorf used physical force to take it from him against his will, and that Appellant cannot be considered to have abandoned the bag. It follows that Appellant retained his expectation of privacy with respect to it. see State v. Looney, 911 S.W.2d 642, 643-645 (Mo. App. S.D. 1995) (holding that the Looney defendant did not voluntarily give up control of a canister that fell out of his canoe when it capsized and rejecting the state's contention that the Looney defendant abandoned the canister and gave up any expectation of privacy he had in its contents); see also State v. Courtney, 102 S.W.3d 81, 85-86 (Mo. App. W.D. 2003) (holding that the Courtney defendant did not voluntarily give up control of a bolt that happened to fall to the ground as he exited his vehicle and rejecting the state's contention that the Courtney defendant abandoned the bolt and gave up any expectation of privacy he had in its contents).

II. The state failed to show what the St. Louis City ordinance pertaining to peace disturbance says and otherwise failed to show that the officers had probable cause to arrest Appellant for violating its provisions so as to justify their subsequent seizure and search of the bag he was carrying at the time of his arrest.

Officer Burgdorf testified that he decided to approach Appellant and arrest him for peace disturbance. (Tr. 163). His testimony to that effect was as follows:

> "After his continued, you know, vulgar assaults against us witness – one of the witnesses who had his juvenile daughter there, he actually placed his hand over her ear and then pulled her in and covered her other ear with his leg. It was at that point that I decided that obviously he was disturbed by what was going on as well. At that point, I decided to approach him and place him under arrest for peace disturbance." (Tr. 163).

In addition, Officer Burgdorf went on to testify, that he then handcuffed and arrested Appellant and escorted him to his police vehicle, at which point he advised Appellant he was under arrest for peace disturbance. (Tr. 171-173). Officer Burgdorf also made it clear that at that point, Appellant was not under arrest for anything other than peace disturbance. (Tr. 171-174). Moreover, during Appellant's trial, the following exchange took place between Appellant's trial attorney and Officer Burgdorf:

> **Appellant's trial attorney:** "So you went to arrest him for peace disturbance, correct?"
>
> **Officer Burgdorf:** "I did."
>
> **Appellant's trial attorney:** "And that is a misdemeanor, a city ordinance violation, correct?"
>
> **Officer Burgdorf:** "City Ordinance."
>
> (Tr. 222).

Accordingly, it is clear that Officer Burgdorf decided to arrest Appellant for allegedly violating a St. Louis City ordinance pertaining to peace disturbance, that he then proceeded to handcuff and arrest Appellant and escort him back to his police vehicle, and

that at that point, the only thing Appellant was under arrest for was for allegedly violating the St. Louis City ordinance pertaining to peace disturbance. (Tr. 163, 171-174, 222).

It is also clear that Officer Burgdorf did not have probable cause to arrest Appellant for violating the St. Louis City ordinance pertaining to peace disturbance. Probable cause exists when the circumstances and facts would warrant a person of reasonable caution to believe an offense has been committed. State v. Kampschroeder, 985 S.W.2d 396, 398 (Mo. App. E.D. 1999). The determination of whether an officer has probable cause to make an arrest must be made in relation to the circumstances as they appeared to a prudent, cautious and trained police officer. Id. More than bare suspicion is required to support a finding of probable cause. Id. The type of facts needed to determine probable cause is found, inter alia, in the definition of the substantive offense. Id.

Turning then to definition of the substantive offense at issue, the St. Louis City Ordinance pertaining to peace disturbance reads as follows:

> "Any person who shall disturb the peace of others by noisy, riotous or disorderly conduct, or by violent, tumultuous, offensive or obstreperous conduct or carriage, or by loud and unusual noises, or by unseemly, profane, obscene, indecent, lewd, or offensive language, *calculated to provoke* **a breach of the peace**, or by assaulting, striking or fighting another in any park, street, alley, highway, thoroughfare, public place or public resort within the City, or any person who, in the City, shall permit any such conduct in or upon any house or premises owned or possessed by him or under his management or control, so that others in the vicinity

are disturbed thereby, shall be guilty of a misdemeanor." See St. Louis City Revised Code 15.46.030.

And in City of St. Louis v. Tinker, the Supreme Court of Missouri held: "that in Missouri it now is and always has been the law that 'breach of the peace' unless otherwise defined in the ordinance or statute using the term, refers only to acts or conduct inciting violence or intended to provoke others to violence." City of St. Louis v. Tinker, 542 S.W.2d 512, 516 (Mo. Banc. 1976).

Given the plain language of the St. Louis City ordinance pertaining to peace disturbance, the Supreme Court of Missouri's holding in City of St. Louis v. Tinker, and the facts of Appellant's case, it is clear that Officer Burgdorf did not have probable cause to arrest Appellant for violating the St. Louis City Ordinance pertaining to peace disturbance. This is because there is nothing in the record which suggests that Appellant did anything that was calculated to provoke a "breach of the peace." Officer Burgdorf did testify that as Appellant was parking his vehicle, he stared at the officers for approximately 30 seconds and that as he stepped out of his vehicle after having parked it, he took one step towards the officers, reached down to his genital area, grabbed his crotch, spit in the officers' direction, and said: "What the fuck are you looking at, bitch?" (Tr. 160-161). Officer Burgdorf also testified that Appellant drew his attention and that other people in the area "seemed to be concerned with what [Appellant] was saying as well." (Tr. 161-162). Officer Burgdorf even testified that Appellant continued to mutter vulgarities and that this caused an individual to cover his daughter's ears and that he decided that the individual was "disturbed by what was going on." (Tr. 163). However, it

cannot reasonably be said that Appellant did anything which was "calculated to provoke a breach of the peace" within the meaning of the St. Louis City Ordinance pertaining to peace disturbance and the Supreme Court of Missouri's holding in City of St. Louis v. Tinker.

In his direct appeal to the Missouri Court of Appeals for the Eastern District, Appellant pointed out the holding of City of St. Louis v. Tinker, 542 S.W.2d 512, 516 (Mo. Banc. 1976), which is that violation of the peace disturbance ordinance at issue requires conduct calculated to provoke a "breach of the peace" and that Missouri Courts have interpreted this to mean "acts or conduct inciting violence or intended to provoke others to violence." (Appellant's Direct Appeal Brief 20). In response to this argument, the Eastern District Court purported to look to the record and found that: "[g]iven the number of people in the vicinity, as well as the dangerous nature of the neighborhood, a prudent, cautious, and trained police officer in Officer Burgdorf's position reasonably could conclude that [Appellant's] conduct was intended to provoke others to violence or was reasonably probable to incite violence." Opinion 8. This finding ignores the evidence and the reality of the situation, is NOT supported by the record, and is clearly erroneous. The fact is that Officer Burgdorf never once testified, or even suggested, that he arrested Appellant because he thought Appellant's conduct was intended to provoke others to violence or reasonably probable to incite violence. In fact, Officer Burgdorf's testimony refutes such a claim. During the hearing on Appellant's motion to suppress evidence, the following dialogue took place between the prosecutor and Officer Burgdorf:

Prosecutor: "At some point you make a decision to approach the defendant?"

Officer Burgdorf: "Yes, sir."

Prosecutor: "At what point was that?"

Officer Burgdorf: "After his continued, you know, vulgar assaults against us witness -- one of the witnesses who had his juvenile daughter there, he actually placed his hand over her ear and then pulled her in and covered her other ear with his leg. *It was at that point that I decided that obviously he was disturbed by what was going on as well.* At that point, I decided to approach him and place him under arrest for peace disturbance."

(Tr. 163).

And at trial the following dialogue took place between the prosecutor and Officer Burgdorf:

Prosecutor: "What caused you at a certain point to actually approach the defendant?"

Officer Burdorf: "Actually, we're kind of used to being yelled out at. You know, unfortunately a lot of people do not like the police. And the father -- what brought me to the point of enough was enough was when the gentleman that I was speaking with grabbed his daughter, he covered her ear with -- covered her ear with his hand and then put her head and covered up her other ear with his leg. At that point I was -- it was clear to me that he was uncomfortable with his daughter hearing the language that he was speaking."

> **Prosecutor:** "Were you able to tell if the other individuals in the area, if their attention had been directed at the defendant and his actions?"
>
> **Officer Burgdorf:** "Yes. Basically everyone was out there on both our side of the street and the other side of the street and were mostly taken aback that he was speaking to the police like that. They were confused to why we weren't taking action to do anything."
>
> (Tr. 197-198).

As such, Officer Burgdorf's testimony belies the fact that he arrested Appellant because he thought Appellant's conduct was intended to provoke others to violence or was reasonably probable to incite violence. (Tr. 163, 197-198). Instead, it shows that Officer Burgdorf arrested Appellant because he and others were disturbed by the language Appellant was using. (Tr. 163, 197-198). The Eastern District simply ignored this evidence. Ultimately, the Eastern District's finding that a "trained police officer in Officer Burgdorf's position reasonably could conclude that [Appellant's] conduct was intended to provoke others to violence or was reasonably probable to incite violence" is so belied by the evidence and the arguments advanced by the state and its officers during the hearing on the motion to suppress and at trial that it is plain to see that it is an afterthought and nothing more than a weak attempt at an end run around the arguments Appellant raised in his direct appeal.

Furthermore, it is impossible to reconcile the Eastern District's finding that a "trained police officer in Officer Burgdorf's position reasonably could conclude that a [Appellant's] conduct was intended to provoke others to violence or was reasonably

probable to incite violence" with the facts of Appellant's case and this Court's holdings in State v. Swodoba, 658 S.W.2d 24 (Mo. Banc. 1983) and State v. Carpenter, 658 S.W.2d 406 (Mo. Banc. 1987). In State v. Swodoba and State v. Carpenter, this Court recognized that laws prohibiting offensive language run afoul of the first amendment unless they are narrowly tailored so as to prohibit only "fighting words" which are words that are personally abusive, addressed in a face to face manner to a specific individual, and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient." see State v. Swodoba, 658 S.W.2d at 25-26 and State v. Carpenter, 658 S.W.2d at 408. In State v. Carpenter, this Court actually said:

> "As stated in State v. Swodoba, 658 S.W.2d 24, 25 (Mo. Banc. 1983) (citing City of St. Louis v. Tinker, 542 S.W.2d 512 (Mo. Banc. 1976) and City of Kansas City v. Thorpe, 499 S.W.2d 454 (Mo. 1973), 'Missouri courts have held that statutes abridging speech are constitutional to the extent that they prohibit only that speech which is likely to incite others to immediate violence.' Thus, the statute must also be construed to only prevent 'fighting words.' The Supreme Court has held that such offensive language can be statutorily prohibited only if it is personally abusive, addressed in a face-to-face manner to a specific individual and uttered under circumstances such that the words have a direct tendency to cause an immediate violent response by a reasonable recipient. *See*, Gard, Fighting Words as Free Speech, 58 Wash. U.L.Q. 531, 558-560, 580 (1980) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)." State v. Carpenter, 658 S.W.2d at 408.

In Appellant's case, Appellant's words were not addressed in a face-to-face manner to a specific individual and were not uttered under circumstances such that the words had a direct tendency to cause an immediate violent reaction by a reasonable recipient. Therefore, under the law, it cannot be said that Appellant's conduct violated any constitutionally permissible interpretation of the St. Louis City ordinance pertaining to peace disturbance. See State v. Swodoba, 658 S.W.2d at 25-26 and State v. Carpenter, 658 S.W.2d at 408; see also Gooding v. Wilson, 405 U.S. 518, 524 (1972) (striking down a Georgia statute on the grounds that it was unconstitutionally overbroad and infringed on protected speech because the Georgia appellate courts had not construed the statute to be limited in application to words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (striking down a New Orleans ordinance making it unlawful "to curse or revile or to use obscene or opprobrious language toward or with reference to" a police officer while in performance of his duties on the grounds that the ordinance infringed on protected speech despite the fact that the Supreme Court of Louisiana had claimed that the ordinance at issue was restricted to fighting words uttered to specific persons at a specific time); and Hess v. Indiana, 414 U.S. 105 (1973) (holding that a disorderly conduct statute was unconstitutionally overbroad as applied to the Hess defendant and that the fact that the Hess defendant had said "We'll take the fucking street later" while facing a crowd at an antiwar demonstration while a sheriff and his deputies were attempting to clear the street, could not be punished as obscene or as fighting words

or having a tendency to lead to violence and came within constitutional guarantees of freedom of speech).

In addition, other than remarks made by Officer Burgdorf, the record does not reveal information about a St. Louis City ordinance pertaining to peace disturbance. No city ordinance was offered or admitted in evidence. As such, there was no evidence before the trial court upon which it could have decided that Officer Burgdorf had probable cause to arrest Appellant for violating a St. Louis City ordinance pertaining to peace disturbance. see Queen of Diamonds, Inc. v. Quinn, 569 S.W.2d 317, 319 (Mo. App. St. Louis Dist. 1978); State v. Furne, 642 S.W.2d 614, 616-617 (Mo. Banc. 1982); State v. Dye, 272 S.W.3d 879, 881-882 (Mo. App. S.D. 2008) (citing City of University City v. MAJ Investment Corp, 884 S.W.2d 306, 308 (Mo. App. E.D. 1994)); L----N. H---- v. Wells, 705 S.W.2d 488, 493-494 (Mo. App. W.D. 1985); and Consumer Contact Company v. State of Missouri, Department of Revenue, 592 S.W. 2d 782, 785 (Mo. Banc. 1980).

In denying Appellant's appeal, the Missouri Court of Appeals for the Eastern District ignored material matters of law and fact and completely disregarded the law when it ignored the fact that there was no evidence before the trial court upon which it could have decided that Officer Burgdorf had probable cause to arrest Appellant and found that the trial court was readily capable of determining that Officer Burgdorf had probable cause to arrest Appellant for violating the St. Louis City Ordinance pertaining to peace disturbance. In its opinion, the Eastern District said:

> "[Appellant] also argues that because the peace disturbance ordinance itself was not offered or admitted into evidence at trial, there was no evidence before the trial court upon which it could have decided that Officer Burgdorf had probable cause to arrest [Appellant]. Given the trial court's knowledge and experience, as well as the existence of substantial case law construing the ordinance in question, the trial court was readily capable of determining that Officer Burgdorf had probable cause to arrest [Appellant] without a copy of the ordinance being admitted into evidence." (Opinion 7 at footnote 1).

This finding is contrary to clearly established caselaw. In Queen of Diamonds, Inc. v. Quinn, the Missouri Court of Appeals for the St. Louis District said the following:

> "The courts of Missouri have repeatedly held that neither trial nor appellate courts will take judicial notice of municipal ordinances and that such ordinances may be recognized by the Court only if admitted into evidence or stipulated to by the parties." see Queen of Diamonds, Inc. v. Quinn, 569 S.W.2d at 319.

Without citing a single case in support of its position, the Eastern District seeks to carve out an exception to this well established rule of law based on an assumption that the trial court has "knowledge and experience" and because there is caselaw construing the ordinance in question. Moreover, The Eastern District seeks to do this even though the record is devoid of evidence as to what, if any, helpful knowledge and experience the trial court actually had and even though the record is devoid of evidence as to whether the trial court had ever even looked at the St. Louis City ordinance pertaining to peace disturbance or the caselaw construing that ordinance. (Tr. 1-293). This is dangerous

proposition that would leave Appellate courts to speculate as whether trial courts made the proper considerations. More importantly, the law is too well settled that ordinances may be recognized by a court "**only if** admitted into evidence or stipulated to by the parties." Queen of Diamonds, Inc. v. Quinn, 569 S.W.2d at 319.

For example, in State v. Furne,, the Supreme Court of Missouri held that the evidence did not support a conviction for misdemeanor resisting arrest in a case where there was evidence that the Furne defendant resisted arrest and an officer testified that he had arrested the Furne defendant for violating a municipal ordinance pertaining to disorderly conduct because the state failed to prove the existence and content of any municipal ordinance pertaining to disorderly conduct. State v. Furne, 642 S.W.2d at 616-617. In holding as such, the Supreme Court of Missouri said the following:

> "There was also a failure of proof that the offense could be a misdemeanor. Subsection (2) of 575.150.(2) provides that the section applies to "arrests for any crime or ordinance violation." § 575.150(2). Had the information charged that appellant resisted arrest for peace disturbance, the trial court could have taken, and this Court could take, judicial notice that peace disturbance constitutes an offense under state statute. (citation omitted). Direct proof of that fact thus would have been unnecessary. (citation omitted). The information, however, charged that appellant resisted arrest for disorderly conduct. That is not an offense punishable under state statute and can at most be a violation of a local ordinance. Ordinances cannot be judicially noticed, (citations omitted), and the record is devoid of any other proof that disorderly conduct is illegal. **Absent proof of the existence and**

> **content of the ordinance defining the offense for which appellant was charged with resisting arrest, the conviction cannot stand.** The state proved the fact of resistance, but it failed to prove that, under § 575.150(2), the arrest was 'for any crime or ordinance violation.'" State v. Furne, 642 S.W.2d at 616-617.

In State v. Dye, the Missouri Court of Appeals for the Southern District held that the state failed to prove that an investigatory stop of the Dye defendant was justified by reasonable suspicion, in part, because the officer in that case had claimed to have received a report that the Dye defendant was panhandling, but there was no state statute prohibiting panhandling and the state failed to show the existence and content of any city ordinance pertaining to panhandling. State v. Dye, 272 S.W.3d at 881-882. The Southern District specifically found as follows:

> "Other than remarks by Officer Craft, the record does not reveal information about a Poplar Bluff city ordinance directed to 'panhandling.' No city ordinance was offered or admitted in evidence. As such, there is no evidence before this court that identifies conduct on which Officer Craft could have legitimately made an investigative stop. See City of University City v. MAJ Investment Corp., 884 S.W.2d 306, 308 (Mo. App. 1994)." State v. Dye, 272 S.W.3d at 881-882.

And in L----N. H--- v Henry Wells, et al., the Missouri Court of Appeals for the Western District held that the defendants in that case were not entitled to an affirmative defense instruction based on a justified arrest where they failed to put into evidence the ordinance that the plaintiff was supposedly arrested for. L----N. H--- v Henry Wells, et al., 705 S.W.2d at 493-494.

In summary, the state failed to show what the St. Louis City ordinance pertaining to peace disturbance says and otherwise failed to show that the officers had probable cause to arrest Appellant for violating that ordinance. As such, the state failed to carry its burden of showing that the officers lawfully arrested Appellant without violating his constitutionally protected rights to be free of unreasonable search and seizure. Consequently, all evidence that was the fruit of that illegal arrest, including the heroin that was found in the bag Appellant was carrying at the time of his arrest, should have been suppressed. See State v. Jacobs, 704 S.W.2d 300, 301-302 (Mo. App. E.D. 1986) (holding that "[t]The search incident to a lawful arrest exception to the warrant requirement presumes a valid custodial arrest," and that "[a]bsence of probable cause to take a suspect into custody triggers the 'full protection' of the fourth amendment"). The trial court clearly erred in not doing so.

III. Even if the officers lawfully arrested Appellant, the state failed to show that they searched the bag pursuant to lawful authority.

Officer Burgdorf arrested Appellant and in the course thereof, physically ripped a bag from Appellant's possession, causing the bag to fall to the ground. (Tr. 163-166). Subsequently, Officer Burgdorf reached down, picked up the bag, and then walked with Appellant to a police vehicle, at which point he placed the bag on the rear trunk of the police vehicle. (Tr. 167-168). Then after Officer Burgdorf secured Appellant inside the police vehicle, Officer Burgdorf looked in the bag, rummaged through it, and observed a small cellophane bag containing suspected heroin. (Tr. 168, 208).

Prior to trial, Appellant filed a "Motion to Suppress Evidence." (L.F. 12-13). Accordingly, "the state bore the burden of going forward with the evidence and the risk of nonpersuasion…to show by a preponderance of the evidence that the motion to suppress should be overruled." § 542.296 RSMo.

At the hearing on Appellant's motion to suppress evidence, Officer Burgdorf testified that he searched the bag, in part, pursuant to a department policy that required the police to inventory items in the possession of an arrested person. (L.F. 68, 208). Then, the state argued as follows:

> "If anything, this isn't about a search incident to arrest. It is obviously going to be looked at during an inventory search at the station when it's put into the defendant's personal property. Therefore, you know, I believe that the evidence was lawfully seized and does not violate the fourth amendment." (Tr. 179-180).

Subsequently, the trial court bought into the state's argument and asserted that even if Appellant did not abandon the bag, it would have been inventoried at booking and found.

However, it is clear that the state failed to carry its burden of showing that the search of the bag could be upheld as a legitimate inventory search. State v. Ramires, 152 S.W.3d 385, 388-405 (Mo. App. W.D. 2004). This is because in this case as in State v. Ramires, the state failed to adduce evidence that the seizing officer's police department had standardized criteria or established routine for opening closed containers, such as an opaque white plastic bag. see State v. Ramires, 152 S.W.3d at 403-404.

In State v. Ramires, the Missouri Court of Appeals for the Western District held as follows:

> "…for the state, here, to satisfy its burden of proving, as provided in § 542.296.6 RSMo, that the appellant's motion to suppress, challenging the opening of the white plastic bag containing the methamphetamine, should be overruled on the basis that its seizure was legal under the inventory search exception to the Fourth Amendment, it had to introduce evidence at the suppression hearing that the Parkville Police Department had standardized criteria or established routine for opening closed containers, such as the opaque white plastic bag found during the inventory search of the vehicle the appellant was driving when arrested." see State v. Ramires, 152 S.W.3d at 403-404 (citing Florida v. Wells, 495 U.S. 1, 4 (1990) for the notion that "standardized criteria or established routine must regulate the opening of containers found during inventory searches").

It then found that the Ramires trial court erred in denying the Ramires defendant's motion to suppress evidence because the state had failed to carry its burden under § 542.296.6 RSMo of showing that the Parkville police officers who searched an opaque white plastic bag found in Ramires's truck during an inventory search of the truck opened the bag pursuant to standardized criteria or established routine for opening closed containers such as the bag. State v. Ramires, 152 S.W.3d at 403-404. The Ramires Court found that the mere fact that the state did present evidence at the suppression hearing in the Ramires case that the Parkville Police Department had a policy requiring an inventory search of all impounded vehicle, did not change the analysis. Id. at 404.

Appellant's case is analogous to Ramires's. In Appellant's case, just as in Ramires, the state presented evidence that the police had a policy requiring inventory

searches of property found in the possession of arrested subjects and attempted to justify the search of a bag on that basis, but failed to show the police had standardized criteria or established routine for opening closed containers. (see State v. Ramires, 152 S.W.3d at 403-404). This is a violation of the rule announced in Florida v. Wells that "standardized criteria or established routine must regulate the opening of containers found during inventory searches." see Florida v. Wells, 495 U.S. at 4. Hence, Appellant requests this Court to follow the rule of law set forth in State v. Ramires and to find that the trial court erred in denying Appellant's motion to suppress evidence.

Appellant also asserts that the search of Appellant's bag cannot be upheld as incident to arrest even if Appellant's arrest is somehow deemed lawful. This is because the police had taken sole possession of the bag, that bag was not immediately associated with Appellant's person, because Appellant was arrested for peace disturbance, because Appellant was handcuffed and secured in the backseat of a police car when the police searched the bag, and because there were at least four officers on the scene when the police searched the bag. (Tr. 163-168, Tr. 158-159, 190-194). As such, the state cannot justify their search on the grounds that they were looking for the instrumentalities of the crime for which they arrested Appellant. There are no instrumentalities of the crime for which Appellant was arrested. Nor can the state justify the officers' search of the bag on the grounds that Appellant might have retrieved a weapon from the bag. Appellant was handcuffed and secured in the backseat of a police vehicle and could not have accessed the bag at the time of the search. (Tr. 163-168). see United States v. Chadwick, 433 U.S. 1, 15 (1977) (holding that once law enforcement officers have reduced luggage or other

personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest).

CONCLUSION

WHEREFORE, for the reasons set forth in this brief, Appellant requests this Court to find that the trial court clearly erred in denying Appellant's "Motion to Suppress Evidence," to vacate the sentence and judgment in this case, and to discharge Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2015, an electronic version of this brief was sent via electronic mail to the Court and to Mr. Shaun Mackelprang, Office of the Attorney General.

/s/Srikant Chigurupati
Srikant Chigurupati

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify I signed the original copy of this brief, that this brief conforms with Rule 84.04, that this brief contains all the information required by Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 31,000 words. The word-processing software identified this brief as containing 8,688 words and 37 pages including the cover page, signature block, and certificates of service and of compliance.

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